IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

BEGELMAN, ORLOW & MELLETZ, et al., Plaintiff, v. KRISTY FERARA, Defendant.	Case No. 1:12-cv-329

UNITED STATES' MOTION TO QUASH

COMES NOW, the Secretary of the Treasury of the United States and moves to quash the subpoena duces tecum served on Stephen Whitlock on July 27, 2012. Stephen Whitlock is an officer of the Internal Revenue Service Whistleblower Office. The subpoena commands production of all documents related to an identified matter involving the Whistleblower Office. The Secretary of the Treasury respectfully requests that this Court quash the subpoena because it demands the production of documents from a person without the authority to produce them, because it demands the production of documents that are made confidential by statute, and because it was served outside this judicial district and more than one hundred miles from the place of the production.

First, the subpoena should be quashed because Mr. Whitlock does not have the authority to comply with it. Under 5 U.S.C. § 301, the Secretary of the Treasury is authorized to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301. The Secretary of the Treasury has done so, and the regulations are codified at 26 C.F.R. §§ 301.9000-1–301.9000-7. These regulations withdraw from Internal Revenue Service officers the power to release documents of the Internal Revenue Service, absent prior approval as specified in the regulations. 26 C.F.R. § 301.9000-3 (prohibiting disclosure of records absent a "testimony authorization").

It is clear that these regulations are valid. In United States ex rel. Touhy v. Ragen, the Supreme Court held that, under the predecessor to 5 U.S.C. § 301, the "Attorney General can validly withdraw from his subordinates the power to release department papers." 340 U.S. 462, 467, 469–70 (1950). The Touhy Court itself relied on an earlier Supreme Court decision upholding a similar regulation by the Secretary of the Treasury. Id. at 469–70. The earlier case, Boske v. Comingore, held that a revenue collector could not be held in contempt for refusing to produce documents when his refusal was based on a Treasury Regulation. 177 U.S. 459, 470 (1900). The Court explained,

> the Secretary, under the regulations as to the custody, use, and preservation of the records, papers, and property appertaining to the business of his department, may take from a subordinate, such as a collector, all discretion as to permitting the records in his custody to be used for any other purpose than the collection of the revenue, and reserve for his own determination all matters of that character.

Id. at 470.

Under the regulations, the Secretary of the Treasury has withdrawn from Whitlock the power to disclose records of the Internal Revenue Service absent a testimony authorization. No testimony authorization has been issued, and therefore Whitlock is without any authority to produce the documents demanded in the subpoena.

Second, the subpoena should be quashed because it requests documents that are made confidential by 26 U.S.C. § 6103. That statute forbids officers and employees of the United States from disclosing "return information." Return information is broadly defined to include,

> a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition or offense . . . .

26 U.S.C. § 6103(b)(2)(A). The subpoena requests information that falls within this broad definition. As such, § 6103 prevents Whitlock from producing the requested information.

Third, the subpoena should be quashed because it was served improperly. The subpoena was issued from this Court, and it commands production of documents in Cherry Hill, New Jersey, within this judicial district. However, it was served upon Whitlock in Washington, D.C., more than one hundred miles from Cherry Hill. Federal Rule of Civil Procedure 45 does not permit a subpoena to be served outside the judicial district of the court from which it was issued, unless the subpoena is served within one hundred miles of the place specified for production.

WHEREFORE, the Secretary of the Treasury respectfully prays that this Court quash the subpoena served upon Stephen Whitlock on July 27, 2012.

DATED: August 10, 2012.

PAUL J. FISHMAN
United States Attorney

KATHRYN KENEALLY
Assistant Attorney General
Tax Division

/s/ W. Bradley Russell
W. BRADLEY RUSSELL
Department of Justice, Tax Division
Post Office Box 227
Ben Franklin Station
Washington, D.C. 20044
Telephone: 202-307-0854
Facsimile: 202-514-6866
E-Mail: William.B.Russell@usdoj.gov

CERTIFICATE OF SERVICE

IT IS CERTIFIED that a true copy of the foregoing motion to quash was served this 10th day of August 2012 by filing the same with the Clerk of the Court using the ECF filing system, which shall send notification to all attorneys entitled thereto, including the following:

Regina D. Poserina, Esquire
Begelman, Orlow & Melletz
411 Route 70 East
Suite 245
Cherry Hill, New Jersey 08034

Michele D. Hangley, Esquire
Hangley, Aronchick, Segal & Pudlin
20 Brace Road
Suite 201
Cherry Hill, New Jersey 08034

/s/ W. Bradley Russell
W. BRADLEY RUSSELL
Department of Justice, Tax Division
Post Office Box 227
Ben Franklin Station
Washington, D.C. 20044
Telephone: 202-307-0854
Facsimile: 202-514-6866
E-Mail: William.B.Russell@usdoj.gov